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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,	)	
NORTHWEST COALITION FOR	)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,	)	
PACIFIC COAST FEDERATION OF	)	
FISHERMEN'S ASSOCIATIONS, and	)	PLAINTIFFS' MOTION TO MODIFY JULY
INSTITUTE FOR FISHERIES RESOURCES,	)	2, 2002 ORDER TO ESTABLISH
	)	SCHEDULE FOR DEFENDANT TO
Plaintiffs,	)	REVISE THE REQUIRED EFFECTS
	)	DETERMINATIONS AND PROVIDE
v.	)	ADEQUATE FOUNDATION FOR
	)	CONSULTATIONS
ENVIRONMENTAL PROTECTION	)	
AGENCY, and MICHAEL O. LEAVITT,	)	NOTE ON MOTION CALENDAR:
ADMINISTRATOR,	)	FRIDAY, MARCH 4, 2005
	)	
Defendants,	)	
	)	
AMERICAN CROP PROTECTION	)	
ASSOCIATION, et al.,	)	
	)	
Intervenor-Defendants.	)	

TABLE OF CONTENTS

INTRODUCTION .....	1
BACKGROUND .....	1
ARGUMENT.....	6
I.    EPA HAS NOT COMPLIED WITH THE JULY 2, 2002 ORDER’S MANDATE TO MAKE VALID EFFECTS DETERMINATIONS AND INITIATE CONSULTATIONS ACCORDING TO THE PRESCRIBED SCHEDULE.....	6
II.   EPA MUST REVISE ALL EFFECTS DETERMINATIONS MADE USING FLAWED SCIENCE. ....	8
III.  THE COURT SHOULD IMPOSE A REASONABLE SCHEDULE FOR EPA TO REVISE ITS EFFECTS DETERMINATIONS AND INITIATE CONSULTATIONS. ....	10
CONCLUSION.....	11

1 INTRODUCTION

2 This motion seeks a modification of the schedule established by this Court in its July 2,  
3 2002 Order that resolved the parties' cross-motions for summary judgment. The July 2, 2002  
4 Order established a schedule for defendant Environmental Protection Agency ("EPA") to make  
5 effects determinations and initiate consultations on 55 pesticide registrations in accordance with  
6 Section 7(a)(2) of the Endangered Species Act ("ESA"). The effects determinations that EPA  
7 has made to date use deficient scientific information and risk assessment methods, and EPA  
8 admits that it must now revise those effects determinations to ensure that they use the best  
9 available scientific information and methods. However, EPA will not commit to a schedule for  
10 making the necessary revised effects determinations. Accordingly, plaintiffs Washington Toxics  
11 Coalition et al. (the "Toxics Coalition") ask this Court to modify its July 2, 2002 Order to  
12 establish such a schedule.

13 On December 27, 2004, this Court deferred ruling on two motions that sought  
14 clarification or further implementation of the injunctive relief order issued on January 22, 2004,  
15 which is currently on appeal to the Ninth Circuit. The Court struck those motions until the Ninth  
16 Circuit resolves the pending appeals. The instant motion does not hinge on the pending appeals.  
17 Rather, it seeks to amend the previous July 2, 2002 Order that resolved the parties' cross-motions  
18 for summary judgment. Neither EPA nor any of the defendant-intervenors contested this Court's  
19 power to impose a schedule for EPA to make effects determinations or the particular terms of the  
20 July 2, 2002 Order. Accordingly, the Ninth Circuit's resolution of the pending appeals will  
21 affect neither the July 2, 2002 Order, nor this request for an amendment to the schedule  
22 embodied in that Order. This motion is appropriate for this Court's resolution at this juncture.

23 BACKGROUND

24 In early 2001, the Toxics Coalition brought this action seeking to compel EPA to consult

1 with the National Marine Fisheries Service (“NMFS”) to ensure that EPA’s pesticide  
2 registrations do not authorize pesticide uses that will jeopardize the survival and recovery of  
3 salmon and steelhead listed as threatened or endangered under the ESA. On July 2, 2002, this  
4 Court granted the Toxics Coalition’s motion for summary judgment on this claim, holding that:

5       Despite competent scientific evidence addressing the effects of pesticides on  
6 salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation  
7 with respect to its pesticide registrations. Specifically, EPA proffers no evidence  
8 that it has consulted, either formally or informally, with NMFS regarding the 55  
9 pesticide active ingredients for which plaintiffs have standing. Such consultation  
is mandatory and not subject to unbridled agency discretion. The Court declares,  
as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect  
to its ongoing approval of 55 pesticide active ingredients and registration of  
pesticides containing those active ingredients.

10 July 2, 2002 Order at 15 (footnote referencing EPA findings of risks from the pesticides  
11 omitted).

12       To remedy these violations, the Court “orders EPA to initiate and complete section  
13 7(a)(2) consultation with NMFS regarding the effects of pesticide registrations on threatened and  
14 endangered species” according to a prescribed schedule. *Id.* at 20. That schedule established a  
15 series of nine deadlines beginning with July 15, 2002 and ending with December 1, 2004. By  
16 each deadline, “EPA shall make effects determinations and consult, as appropriate, for” a  
17 designated number of pesticides. *Id.* at 17.

18       EPA has made initial effects determinations for batches of pesticides roughly in  
19 accordance with the Court-ordered schedule, see  
20 <http://www.epa.gov/oppfead1/endanger/effects/>. However, as described more fully below, those  
21 effects determinations have proven to be inadequate because they rely upon risk assessments that  
22 have been discredited by NMFS and the Fish and Wildlife Service (“FWS”), and that EPA has  
23 since recognized must be revised to respond to the Service’s critiques.

1           On July 26, 2004, the Toxics Coalition sent EPA a 60-day notice of intent to sue  
2 explaining that EPA violated the ESA by failing to engage in formal consultation with NMFS  
3 based on its erroneous conclusion that particular pesticides would have “no effect” or would be  
4 “not likely to adversely affect” listed salmonids. Letter to Michael O. Leavitt, EPA  
5 Administrator from Earthjustice (July 26, 2004) (Exhibit 1 to Fifth Declaration of Patti Goldman  
6 (Feb. 4, 2005)). As the 60-day notice explains, both NMFS and FWS have identified substantial  
7 flaws in EPA’s pesticide risk assessments, which form the basis of the effects determinations  
8 EPA made pursuant to this Court’s July 2, 2002 Order. More specifically, NMFS and FWS have  
9 criticized EPA’s methodology as being under-protective of species because it does not account  
10 for the full impacts of the pesticide use, excluding, e.g., sublethal, cumulative, ecosystem, and  
11 synergistic effects. In addition, EPA’s effects determinations fail to assess: (1) the full impacts  
12 of pesticide use in urban areas, which poses unique problems to salmonids due to urban run-off  
13 and sewage systems that prevent degradation of the pesticides over time or in soil; and (2) U.S.  
14 Geological Survey detections of the pesticides in surface waters in salmon watersheds in  
15 Washington, Oregon, and California. By ignoring such critically important effects, EPA’s  
16 effects determinations underestimate and dismiss the pesticides’ full impacts.

17           In April 2004, NMFS drafted a letter soundly criticizing EPA’s risk assessments and  
18 refusing to concur in EPA’s “not likely to adversely affect” determinations. The draft letter  
19 states that formal consultation is required for the pesticides’ effects on the 26 salmonid ESUs  
20 because the pesticide uses “may have greater than discountable or insignificant effects on listed  
21 species.” NMFS’s Draft Nonconcurrency Letter at 1 (Exhibit 2 to Fifth Goldman Decl.). More  
22 specifically, NMFS concludes that EPA’s risk assessments do not constitute the best available  
23 science because: (1) they are not based on the available peer reviewed scientific literature; (2)  
24

1 they focus on active ingredients to the exclusion of inert ingredients, additives, and the full range  
2 of uses of the products; (3) they are devoid of critical information about the locations and needs  
3 of the listed salmon species; (4) they lack information about critical exposures, such as those  
4 from residential uses and cumulative exposures; and (5) they fail to incorporate evidence of  
5 probable sublethal effects. Id. at 2-3. Without this information, NMFS states that it cannot  
6 evaluate the pesticides' impacts on listed salmon and can have no assurance that the pesticide  
7 uses will not cause serious risks and adverse effects. Id. at 3-4.

8 By letter dated September 24, 2004, EPA responded to the Toxics Coalition's 60-day  
9 notice by making a vague commitment to review and revise its effects determinations.  
10 "Specifically, it is EPA's intention to review our determinations and, where appropriate, prepare  
11 an updated ecological risk assessment for these pesticides for which EPA has made 'may affect'  
12 determinations for one or more evolutionarily significant units (ESUs)" subject to the July 2,  
13 2002 Order. Letter to Patti Goldman, Earthjustice, from James J. Jones, EPA's Office of  
14 Pesticide Programs, at 1 (Sept. 24, 2004) (Exhibit 3 to Fifth Goldman Decl.). In this review,  
15 EPA will follow the approach they presented to the Services in an overview of EPA's risk  
16 assessment process. Id.<sup>1</sup>

17 By letter dated October 27, 2004, the Toxics Coalition notified EPA's counsel that EPA's  
18 issuance of inadequate effects determinations fails to comply with the schedule this Court  
19 imposed in its July 2, 2002 Order:

20 First, [the July 2, 2002] Order directs EPA to make effects determinations  
21 according to a schedule that is largely past. Implicit in this direction is the

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22 <sup>1</sup> The Services relied on the changes to the risk assessment in deciding to promulgate regulations  
23 that purport to delegate to EPA the authority to engage in self-consultations on categories of  
24 pesticides. The self-consultation regulation is the subject of a legal challenge pending before this  
Court. See Washington Toxics Coalition v. U.S. Dep't of Interior, No. C04-1998C (filed Sept.  
25 23, 2004).

1 requirement that the effects determinations use the best science and address the  
2 full impacts of the pesticide uses as required by Section 7 of the ESA. By  
3 acknowledging the need to redo the “not likely to adversely affect”  
determinations, EPA is admitting that it fell short of preparing adequate effects  
determinations in accordance with the timeline imposed by the Court.

4 Second, the July 2, 2002 order compels EPA to initiate consultation, as  
5 appropriate, based on its effects determinations. To initiate consultation, EPA  
6 must provide the National Marine Fisheries Service (“NMFS”) sufficient  
7 scientific and factual information to enable NMFS to assess the full impacts of the  
8 pesticide use, to make a jeopardy finding, and to develop an appropriate incidental  
take statement. However, EPA has failed to provide sufficient information for  
NMFS to conduct the consultation. While it will be updating its effects  
determination to add some missing information, it obviously cannot do so in  
compliance with the court-ordered schedule.

9 We believe it is appropriate for the parties to develop a supplemental schedule  
10 and to ask Judge Coughenour to modify his July 2, 2002 [Order] to include  
11 deadlines for making revised effects determinations and submitting more  
12 complete information to NMFS for the consultations. . . . [W]e are willing to  
13 work with EPA to come up with a suitable, but expeditious, timeline for  
reviewing and upgrading the effects determinations. It is our view, however, that  
the review should encompass “no effect” as well as “not likely to adversely  
affect” determinations.

14 Letter to Wayne D. Hettenbach, Department of Justice, from Patti Goldman, Earthjustice (Oct.  
15 27, 2004) (Exhibit 4 to Fifth Goldman Decl.).

16 EPA responded by letter dated December 13, 2004 – two weeks after the final deadline  
17 established by this Court for preparing legally valid effects determinations. In its response, EPA  
18 asserted that it was in compliance with the Court’s schedule and that it is “implementing its plan  
19 for completing its consultation obligations.” Letter to Patti Goldman, Earthjustice, from Wayne  
20 Hettenbach, Department of Justice, at 1 (Dec. 13, 2004) (Exhibit 5 to Fifth Goldman Decl.).  
21 EPA did not produce any consultation plan, nor did it assert that its “plan” established deadlines  
22 for making effects determinations or initiating consultations. Nonetheless, EPA argued there  
23 was no basis for the Court to establish a schedule for EPA to revise its effects determinations or  
24 to complete the consultation process. See id. at 1-2.

1 ARGUMENT

2 By this motion, the Toxics Coalition requests that the Court establish a schedule for EPA  
3 to revise its effects determinations to incorporate the best available science and to consider the  
4 full impacts of the pesticides on salmonids and their habitat. EPA concedes that it must redo  
5 most of the effects determinations that have been made to date, tacitly admitting that they failed  
6 to use the best available science. Since the Court's July 2, 2002 Order presupposed that EPA  
7 would make effects determinations that use the best available science and that enable NMFS to  
8 engage in Section 7(a)(2) consultations on the pesticides, EPA is out of compliance with it.  
9 EPA's insistence on an open-ended timeline to make valid, scientifically credible effects  
10 determinations runs counter to the intent of the July 2, 2002 Order and to its obligations under  
11 the ESA. The Toxics Coalition accordingly asks the Court to modify the July 2, 2002 Order to  
12 establish a one-year schedule for revising the effects determinations and initiating consultations  
13 so that the consultation process can lead to jeopardy determinations and the development of on-  
14 the-ground measures to protect listed salmon and steelhead.

15 I. EPA HAS NOT COMPLIED WITH THE JULY 2, 2002 ORDER'S MANDATE TO  
16 MAKE VALID EFFECTS DETERMINATIONS AND INITIATE CONSULTATIONS  
ACCORDING TO THE PRESCRIBED SCHEDULE.

17 This Court's July 2, 2002 Order directed EPA to make effects determinations and initiate  
18 consultations, as appropriate. Implicit in this direction is the requirement that the effects  
19 determinations be legally and factually sufficient to conduct an ESA Section 7(a)(2)  
20 consultation. EPA's effects determinations fall short in two critical respects.

21 First, an ESA consultation must utilize "the best scientific and commercial data  
22 available." 16 U.S.C. § 1536(a)(2). This directive extends to both the action agency – here EPA  
23 – and to NMFS as the expert fish and wildlife agency. By basing its effects determinations on  
24 incomplete scientific information, omitting, for example, peer reviewed scientific literature and



1 U.S. Geological Survey detections of pesticides in salmon watersheds, EPA has not used the best  
2 scientific information in its effects determinations, nor has it supplied the best science to NMFS  
3 for the ensuing Section 7(a)(2) consultations.

4 Second and related, the consultation regulations specify that when action agencies engage  
5 in Section 7 consultations, they must initiate consultation by making a written request, and by  
6 providing the Services with the “best scientific and commercial data available or which can be  
7 obtained during the consultation for an adequate review of the effects that an action may have  
8 upon listed species or critical habitat.” 50 C.F.R. § 402.14(c), (d). This mandate encompasses  
9 not only the ESA’s best science requirement, but also the common sense obligation for the action  
10 agency to provide the full body of information that is necessary to conduct the Section 7  
11 consultation. Indeed, EPA has not “initiated” consultation, as this Court ordered it to do, and  
12 NMFS cannot conduct its assessment and make its jeopardy determination until EPA provides all  
13 available and necessary scientific information to NMFS. See Precision Pine & Timber, Inc. v.  
14 United States, 50 Fed. Cl. 35, 48 (Cl. Ct. 2001) (consultation on timber sales’ effects on the  
15 threatened Mexican spotted owl “did not actually commence” until the Forest Service “included  
16 all necessary information in the initial biological assessment” submitted to the Fish and Wildlife  
17 Service). Nor can an action agency rely on the outcome of an ESA consultation that is based on  
18 only a portion of the available scientific record. See Resources Ltd, Inc. v. Robertson, 35 F.3d  
19 1300, 1305 (9<sup>th</sup> Cir. 1994) (action agency’s reliance on biological opinion is not justified where  
20 agency failed to provide Fish and Wildlife Service with the best available science).

21 In purporting to make the effects determinations required by the July 2, 2002 Order, EPA  
22 has failed both to utilize the best science and to provide NMFS sufficient information to conduct  
23 the consultations. It is therefore not surprising that NMFS has been unable to complete even a  
24

1 single pesticide consultation on any of the pesticides at issue in this case, notwithstanding the  
2 passage of over two and a half years since EPA made the first effects determinations mandated  
3 by the July 2, 2002 Order. By agreeing to revise its effects determinations in response to the  
4 Toxics Coalition's 60-day notice and NMFS's draft nonconcurrency letter, EPA tacitly concedes  
5 that its prior effects determinations are inadequate. See EPA Sept. 24, 2004 Letter, at 1 (Exhibit  
6 3). EPA has recently made improvements to its risk assessment process in response to critiques  
7 from NMFS and FWS finding that EPA's previous methodologies improperly ignored harmful  
8 impacts to salmonids and other endangered species.<sup>2</sup> To comply with this Court's directive, EPA  
9 must now revise its effects determinations to consider the full impacts of pesticides on salmonids  
10 and their habitat. Only with a valid effects determination and a more complete body of  
11 supporting scientific information can EPA initiate and NMFS conduct the Section 7  
12 consultations that will determine what measures are necessary to protect these imperiled fish.

13 **II. EPA MUST REVISE ALL EFFECTS DETERMINATIONS MADE USING FLAWED**  
14 **SCIENCE.**

15 In its September 24, 2004 response to the Toxics Coalition's 60-day notice, EPA stated  
16 that "it is EPA's intention to review our determinations and, where appropriate, prepare an  
17 updated ecological risk assessment for those pesticides for which EPA has made 'may affect'  
18 determinations . . . ." September 24, 2004 EPA Letter at 1. In contrast, EPA refused to commit  
19 to reassess those pesticides for which EPA has made "no effect" determinations. Id. at 2.

20 In keeping with the 1986 joint consultation regulations, EPA made three types of effects

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21 <sup>2</sup> While EPA's revised risk assessment process fills in some gaps that had been identified by the  
22 Services, it still leaves other gaps and allows EPA to use its subjective judgment rather than hard  
23 scientific data to assess many pesticide impacts. See Complaint filed in Washington Toxics  
24 Coalition v. U.S. Dep't of Interior, No. C04-1998C (filed Sept. 23, 2004). While the Toxics  
Coalition believes additional improvements are necessary, at a minimum, EPA must utilize the  
more rigorous risk assessment process that it has developed.

1 determinations: (1) may affect, likely to adversely affect listed salmonids, which leads to a  
2 formal consultation with NMFS; (2) may affect, not likely to adversely affect listed salmonids,  
3 which leads to an informal consultation with NMFS; and (3) no effect on listed salmonids, which  
4 precludes any consultation with NMFS. See 50 C.F.R. §§ 402.13-402.14. The ESA's best  
5 science mandate, which applies to EPA's discharge of its Section 7(a)(2) obligations, however,  
6 governs all EPA's effects determinations, no matter what the outcome.

7       The basis for the Toxics Coalition's 60-day notice is the gaps in the risk assessments  
8 underlying the effects determinations. EPA has agreed to revisit its initial effects determinations  
9 because it has modified its risk assessments to correct some of the deficiencies uncovered by the  
10 Services. These gaps and deficiencies pervade all EPA's initial effects determinations that rely  
11 on the admittedly flawed risk assessment process, not simply those that identified adverse  
12 impacts on salmonids. Indeed, since the risk assessments overlooked various types of impacts,  
13 such as synergistic, sublethal, and cumulative effects, and those resulting from urban usage  
14 patterns, the likely outcome of revised effects determinations will be additional adverse effects  
15 findings. It is not the starting point that matters, but rather the missing scientific analysis and  
16 data. For example, EPA made "no effect" determinations across-the-board for two pesticides –  
17 dicamba and atrazine – that USGS detected in salmon watersheds at levels that exceed standards  
18 established to protect aquatic life. See <http://www.epa.gov/oppfead1/endanger/effects/>;  
19 Declaration of Richard D. Ewing, Ph.D (May 7, 2001) (filed in support of plaintiffs' motion for  
20 summary judgment and attached as Exhibit 6 to Fifth Goldman Decl.). By ignoring the USGS  
21 detections, EPA failed to incorporate the best science into its effects determinations. Conducting  
22 a more probing inquiry using the best science may well change the outcome.

23       In its December 13, 2004 letter, EPA objected to reassessing its "no effect"

1 determinations so that EPA and the Services can focus their resources on the pesticide uses that  
2 pose the greatest risk. The Toxics Coalition shares that goal and would welcome a schedule that  
3 placed the “no effect” determinations at the end. However, EPA has minimized the impact of the  
4 pesticide uses by ignoring scientific evidence and may have falsely characterized some pesticide  
5 uses as less consequential. Because its initial “no effect” determinations are flawed, EPA cannot  
6 rely on them to terminate its consultation obligations. Accordingly, the Toxics Coalition asks  
7 this Court to order EPA to reassess and revise all its initial effects determinations, while allowing  
8 EPA to establish a prioritization scheme that leaves the across-the-board “no effect”  
9 determinations to the end.

10 **III. THE COURT SHOULD IMPOSE A REASONABLE SCHEDULE FOR EPA TO**  
11 **REVISE ITS EFFECTS DETERMINATIONS AND INITIATE CONSULTATIONS.**

12 This Court’s July 2, 2002 Order established a December 1, 2004 deadline for EPA to  
13 make effects determination and initiate consultation on 55 pesticides. EPA’s deadline for  
14 making legally valid effects determinations has passed.

15 EPA is willing to revise its effects determinations, but resists the imposition of any court-  
16 ordered schedule to do so, arguing instead that it should be granted unbridled discretion to  
17 determine both whether and when to conduct such reassessments and revisions. September 24,  
18 2004 Letter, at 1 (Exhibit 3). When it comes to pesticides and salmon, EPA’s Section 7(a)(2)  
19 history has been characterized by denial and delay. EPA never began the process of complying  
20 with Section 7(a)(2) until ordered to do so by this Court, and then it made effects determinations  
21 that ignored significant pesticide impacts on salmon and their habitat. Moreover, it has been two  
22 and a half years since EPA completed its first effects determination, and not a single consultation  
23 has been completed, in large part, due to the incomplete scientific record supplied by EPA. See  
24 50 C.F.R. § 402.14(e) (“Formal consultation concludes within 90 days of its initiation unless

1 extended as provided [in the regulations]”).

2 EPA’s recalcitrance and its failure to make valid effects determinations in accordance  
3 with the schedule imposed by this Court call for continued judicial oversight in the form of a  
4 court-ordered schedule for revising the effects determinations for the 55 pesticides. Accordingly,  
5 the Toxics Coalition requests that the Court establish a new schedule for EPA to update its  
6 effects determinations using the best available science, as required by the ESA. Because EPA  
7 has already compiled a significant, albeit incomplete, body of information on the pesticides in its  
8 initial effects determinations, completing the revisions should be less time-consuming than  
9 making the initial effects determinations. The Toxics Coalition, therefore, asks the Court to  
10 impose a one-year schedule, with quarterly interim deadlines, for EPA to revise its effects  
11 determinations and initiate consultations on the 55 pesticides subject to the July 2, 2002 Order.

## 12 CONCLUSION

13 For these reasons, the Toxics Coalition asks the Court to modify the July 2, 2002 Order to  
14 establish a one-year schedule for EPA to revise its effects determinations and initiate  
15 consultations, as appropriate, for the 55 pesticides subject to that Order.

16 Respectfully submitted this 4<sup>th</sup> day of February, 2005.

17  
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On February 4, 2005, I served a true and correct copy of:

1. Plaintiffs' Motion to Modify July 2, 2002 Order to Establish Schedule for Defendant to Revise the Required Effects Determinations and Provide Adequate Foundation for Consultations;
2. Declaration of Patti Goldman; and
3. [Proposed] Order Granting Plaintiffs' Motion to Modify July 2, 2002 Order to Establish Schedule for Defendant to Revise the Required Effects Determinations and Provide Adequate Foundation for Consultations.

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☐ via hand delivery  
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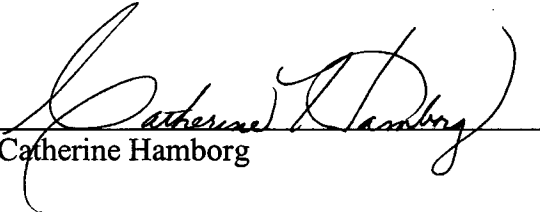
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17 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and  
18 correct. Executed this 4<sup>th</sup> day of February, 2005, at Seattle, Washington.

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26  
  
Catherine Hamborg